86 1716

No. 86-

Supreme Court, U.S.
FILED
APR 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY A. MOORE,
Petitioner,

v.

STATE BANK OF BURDEN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

STEVEN L. CRANFORD
Counsel of Record
9920 East Harry
Wichita, Kansas 67207
(316) 689-4100

JAMES P. NEHF
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5300
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

148pp

QUESTIONS PRESENTED

The Supreme Court of Kansas has effectively preempted Section 207 of the Social Security Act, 42 U.S.C. § 407 (1982), by adopting a rule that permits a bank to exercise a setoff against an individual's social security disability benefits. The decision thus severely limits Section 207's blanket prohibition on the assignment and alienation of social security entitlements and conflicts directly with the statute's purpose of insulating benefits from the claims of creditors. As a result, Kansas law now permits financial institutions to take social security benefits as a setoff against a purported debt of the recipient without court process or the recipient's knowledge or consent. The questions thus presented are:

1. Did the Supreme Court of Kansas err in creating an exception to the anti-alienation provisions of the Social Security Act, 42 U.S.C. § 407 (1982), by permitting the taking of social security benefits through the exercise of a bank setoff?

2. Did the Supreme Court of Kansas preempt the anti-alienation provisions of the Social Security Act, 42 U.S.C. § 407 (1982), thus violating the Supremacy Clause of the United States Constitution, by allowing a bank to exercise a right of setoff pursuant to a Kansas statute?

PARTIES TO PROCEEDINGS

Petitioner, Rodney A. Moore, is a surviving son of Kathleen A. Grubb and is the court-appointed administrator of her estate. He is the substituted party plaintiff. This action was originally brought in the name of Kathleen A. Grubb prior to her death in December 1983.

Respondents are the State Bank of Burden, a Kansas banking corporation; Wayne E. Temple and Ruby M. Temple, both individually and as executive officers, directors and principal shareholders of the State Bank of Burden.

TABLE OF CONTENTS OF PETITION

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS OF PETITION	iii
TABLE OF CONTENTS OF APPENDIX	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Statutory Background	2
B. Proceedings Below	3
REASONS FOR GRANTING THE WRIT	6
I. THE LIMITATION ON SECTION 207 IMPOSED BY THE SUPREME COURT OF KANSAS IS CONTRARY TO THIS COURT'S PRECEDENT AND VIOLATES THE SUPREMACY CLAUSE	7
II. THE KANSAS SUPREME COURT'S RULING CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL AND STATE COURTS	10
CONCLUSION	14

TABLE OF CONTENTS OF APPENDIX

	Page
A. Opinion of the Supreme Court of the State of Kansas	1a
B. Decision of the Court issued by the District Court of Cowley County, Kansas	16a
C. Order of the Supreme Court of the State of Kansas denying motion for rehearing	24a
D. Order of the Supreme Court of the State of Kansas denying petition for review	25a
E. Constitutional Provisions and Statutes Involved	26a

TABLE OF AUTHORITIES

CASES	Page
Anderson v. First National Bank of Atlanta, 260 S.E.2d 501 (Ga. App. 1979)	12
Century Indemnity Co. v. Mead, 159 A.2d 325 (Vt. 1960)	14
Demp v. Emerson Enterprises, 504 F. Supp. 281 (E.D. Pa. 1980)	12
Department of Health and Rehabilitative Services v. Davis, 616 F.2d 828 (5th Cir. 1980)	10
Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985)	11
Ellender v. Schweiker, 575 F. Supp. 590 (S.D. N.Y. 1983)	12
Finance Acceptance Co. v. Breaux, 419 P.2d 955 (Colo. 1966)	13, 14
**Finberg v. Sullivan*, 634 F.2d 50, 63 (1980)	7, 9, 10, 11
First National Bank of Cushing v. Funnell, 290 P. 177 (Okla. 1930)	14
French v. Mich. Dept. of Soc. Serv., 285 N.W.2d 427 (Mich. 1979)	10
**Hines v. Davidowitz*, 312 U.S. 52 (1941)	7, 9
Household Finance Corporation v. Chase Manhattan Bank, 397 N.Y.S.2d 564 (1977)	14
**Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979)	7, 9
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	7
**Kruger v. Wells Fargo Bank*, 521 P.2d 441 (Cal. 1974)	13
Matter of Vary's Estate, 237 N.W.2d 498 (Mich. App. 1975)	14
Moore v. State Bank of Burden, 729 P.2d 1205 (Kan. 1986)	1, 5, 8
Neavear v. Schweiker, 674 F.2d 1201 (7th Cir. 1982)	7, 9
Neeley v. Century Finance Co. of Arizona, 606 F. Supp. 1453 (D. Ariz. 1985)	11, 12
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)	11
**Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973)	3, 8

* Cases principally relied upon are marked with asterisks.

TABLE OF AUTHORITIES—Continued

	Page
**Porter v. Aetna Casualty Co.*, 370 U.S. 159 (1962)	8, 9
United Metal Products Corporation v. National Bank of Detroit, 811 F.2d 297 (6th Cir. 1987)	11
United States v. Rutherford, 442 U.S. 544 (1979)	11
United States v. Silk, 331 U.S. 704 (1947)	7
CONSTITUTIONAL AND STATUTORY PROVISIONS	
U.S. Const. Art. VI, cl. 2	2
15 U.S.C. § 1693d	4
28 U.S.C. § 1257(3)	1
28 U.S.C. § 2403(b)	2
29 U.S.C. § 1056(d)	11
38 U.S.C. § 3101	6
38 U.S.C. § 3101(a)	8
42 U.S.C. § 407	*passim*
42 U.S.C.A. § 407(b)	3, 9, 11, 12
45 U.S.C. § 231m	6
Kan. Stat. Ann. § 9-1206	2, 3, 4, 7
LEGISLATIVE AND EXECUTIVE MATERIALS	
H.R. Rep. No. 98-47, 98th Cong., 1st Sess. (1983)	3
H.R. Rep. No. 98-25, 98th Cong., 1st Sess. (1983)	3
Pub. L. No. 98-21, 97 Stat. 130, Title III, § 335 (1983)	3
12 C.F.R. § 205.5 (1986)	4
OTHER SOURCES	
Sup. Ct. R. 28.4(c)	2

* Cases principally relied upon are marked with asterisks.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

RODNEY A. MOORE,

Petitioner,

v.

STATE BANK OF BURDEN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Rodney A. Moore hereby petitions for a writ of certiorari to the Supreme Court of the State of Kansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas, affirming the state district court, is reported at 729 P.2d 1205 (Kan. 1986), and appears at App. A. The unreported opinion of the state district court appears at App. B.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on December 5, 1986. Petitioner's first motion for rehearing was denied on January 24, 1987. *See* App. C. Petitioner's second motion for rehearing and review was denied on March 9, 1987. *See* App. D. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article VI, Clause 2.

Section 207 of the Social Security Act of 1935, as amended, codified at 42 U.S.C. § 407 (1982).

Section 6, Article 12, Chapter 9, of the Kansas Statutes Annotated, codified at Kan. Stat. Ann. § 9-1206 (1982).[1]

The constitutional provisions and statutes involved are reprinted in App. E.

STATEMENT OF THE CASE

The Supreme Court of Kansas has adopted and applied in this case a rule of law that permits a bank to use a setoff as a way of circumventing the protections afforded individuals under Section 207 of the Social Security Act. To protect social security beneficiaries and those dependent upon them from the claims of creditors, Congress enacted Section 207 to prohibit the assignment or alienation of social security benefits to third parties. 42 U.S.C. § 407 (1982). The court below held, however, that if a bank is owed a debt by an intended beneficiary, it may take her benefits and deduct them from the debt without court process or her knowledge or consent, and regardless of the existence of a valid bank-depositor relationship. The ruling thus denies intended beneficiaries an important federal right and undermines Congress' broad, protective purpose in enacting Section 207.

A. Statutory Background

Since its enactment in 1935, Section 207 of the Social Security Act (the "Act") has prohibited the assignment or alienation of social security insurance benefits. *See*

[1] This petition questions the constitutionality of Kan. Stat. Ann. § 9-1206 (1982) as applied in this case. Thus, 28 U.S.C. § 2403(b) may be applicable. *See* Sup. Ct. R. 28.4(c).

H.R. Rep. No. 98-25, 98th Cong., 1st Sess. 82 (1983). To insulate social security payments from the claims of creditors, Section 207 provides that rights to payment "shall not be transferable or assignable" and that "monies paid or payable" under the Act shall not be subject to "execution, levy, attachment, garnishment or other legal process." 42 U.S.C. § 407 (1982). In 1983, the statute was amended specifically to provide that these protections shall not be limited or superseded by any other provision of law "except to the extent that it does so by express reference" to Section 207. Pub. L. No. 98-21, Title III, § 335(a), 97 Stat. 130 (1983), codified at 42 U.S.C.A. § 407(b) (West 1983). The 1983 amendment ensured that social security benefits would be free from the claims of third parties "notwithstanding any other provisions of law." *See* H.R. Rep. No. 98-47, 98th Cong., 1st Sess. 153 (1983).[2] In sum, the statute creates a "broad bar" against creditors attempting to reach social security benefits. *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973).

Kansas law provides that a bank has a right to setoff against any matured claim it has against any depositor. Kan. Stat. Ann. § 9-1206 (1982). The Kansas statute does not refer to Section 207 or social security benefits in any way. Prior to this case, Kansas courts had not construed the relationship between a bank's statutory right to setoff and Section 207's broad, anti-alienation guarantees.

B. Proceedings Below

In August 1983, the original party plaintiff, Mrs. Kathleen A. Grubb, brought this action in the state district court in Kansas. Following Mrs. Grubb's death, the petitioner herein, the court-appointed administrator of her estate, was substituted as a party plaintiff. The

---

[2] The effective date of the 1983 amendments was April 20, 1983. Pub. L. No. 98-21, Title III, § 335(c), 97 Stat. 130 (1983). The facts giving rise to this action occurred in July and August of 1983.

allegations of the complaint included, *inter alia*, that Mrs. Grubb terminated her bank account with respondents in 1981, that in 1983 respondents erroneously received from the Social Security Administration two of Mrs. Grubb's disability payments and failed to notify her in violation of the Electronic Funds Transfer Act, 15 U.S.C. § 1693d (1982), 12 C.F.R. § 205.5 (1986), and that, without her knowledge or consent, respondents used the money to offset amounts purportedly owing on an automobile loan, thus violating the anti-alienation provisions of Section 207. App. A at 3a-5a. Mrs. Grubb alleged that respondents' misappropriation of her disability benefits gave rise to a tort claim of conversion.[3]

On June 12, 1985, the state trial court granted respondents' motion for summary judgment. The court ruled that even though Section 207 generally exempts social security insurance benefits from the claims of creditors, and even though Mrs. Grubb's social security payments were erroneously delivered by the Social Security Administration to the bank, respondents were permitted to take the benefits by exercising a bank setoff pursuant to Kan. Stat. Ann. § 9-1206 without the knowledge or consent of Mrs. Grubb. App. B at 20a-21a. The court found that the erroneous delivery of the checks to the bank created a bank-depositor relationship under

---

[3] Mrs. Grubb alleged other facts supporting claims of fraud and tortious outrage, which are not at issue in this petition. In November 1983, she brought an action in federal district court in Kansas raising similar claims. *Moore v. State Bank of Burden*, No. 83-1964 (D.Kan.). The federal action remains pending, although the state court ruling at issue here as to the effect of Section 207 on petitioner's conversion claim has been accorded *res judicata* effect. Order, *Moore v. State Bank of Burden*, No. 83-1964 (D.Kan. Aug. 19, 1985). Thus, although the district court agreed with petitioner that Section 207 precluded a setoff, *id.* at 12-13, the Kansas Supreme Court's ruling barred petitioner's conversion claim in federal court as well. Petitioner's remaining federal claims are based on other federal or state statutes and, with the exception of one claim, have survived a motion for summary judgment. *Id.*

state law and nullified her federal rights and tort claims. App. B at 21a, 23a. In essence, the court held that Section 207 did not protect petitioner against the exercise of respondents' setoff.

Thus, on appeal the conflict between Section 207 and the Kansas setoff procedure was central to petitioner's case. On December 5, 1986, the Supreme Court of Kansas affirmed, but found it not "necessary" to determine whether Mrs. Grubb's social security funds were exempt from setoff. It nevertheless held that state law precluded petitioner from recovering for a violation of the federal exemption:

> It appears to be the contention of the appellant that as the account of Mrs. Grubb was closed and as the social security payments are exempt from setoff, the bank converted those funds when it did not forthwith transfer them to Mrs. Grubb. We do not deem it necessary under the facts of this case to determine whether social security funds deposited with the bank are exempt under 42 U.S.C. § 407 (1982) from a set off by the bank in reliance upon K.S.A. 9-1206. Assuming, arguendo, that such funds are not subject to setoff, the erroneous application of the funds to the past due debt owed by the bank does not constitute conversion.

Moore v. State Bank of Burden, 729 P.2d 1205, 1210 (Kan. 1986). App. A at 9a. The court thus denied petitioner's right to recover in tort for respondents' misappropriation of funds.[4]

The effect of this ruling is to permit a creditor to assert a setoff against social security benefits protected by Sec-

---

[4] The court further held that the only possible remedy for a violation may lie in contract. 729 P.2d at 1211. App. A at 9a. But because Mrs. Grubb had terminated her account with the bank several years earlier, her ability to establish a valid contractual relationship with the bank is unclear. Respondents' violation of Section 207 therefore has gone unremedied.

tion 207 without fear of reprisal in the Kansas courts. Under Kansas law, benefits now lose the protection of Section 207 upon delivery to a financial institution even if the intended recipient does not have an open account with the institution.

REASONS FOR GRANTING THE WRIT

This case presents a question of fundamental importance: Should the prohibition on the alienation of social security benefits be limited by an interpretation of state law that permits the taking of such benefits by an exercise of bank setoff? The Supreme Court of Kansas adopted a rule that restricts Section 207 in a way that is contrary to the decisions of this Court, the intent of Congress and the decisions of other federal and state courts. If allowed to stand, this rule will result, as it did here, in a significant erosion of Section 207 and Congress' purpose of ensuring that social security beneficiaries receive and use their benefits free from the claims of creditors. Kansas law would be allowed to override the manifest federal interest in preserving social security benefits as the safety net providing minimal subsistence to the needy.[5]

Review of this decision is even more compelling because social security beneficiaries are granted no express private right of action under the Social Security Act to enforce their Section 207 rights. The most effective remedy, and perhaps the only practical remedy, for the victim of a violation is to seek relief against the wrongdoer for tortious misappropriation of funds. If the intended benefits recipient is, as in this case, denied her right to seek

---

[5] The ramifications of this case are broad. Not only does the decision open the door to setoffs by financial institutions against social security beneficiaries, its rationale would also permit setoffs against other federal entitlements, such as those provided in 38 U.S.C. § 3101 (1982) (veterans benefits); 45 U.S.C. § 231m (1982) (Railroad Retirement Act); 29 U.S.C. § 1056(d) (1982) (ERISA).

redress in the state courts, then the Section 207 exemption provides a hollow protection to benefits recipients everywhere.

I. THE LIMITATION ON SECTION 207 IMPOSED BY THE SUPREME COURT OF KANSAS IS CONTRARY TO THIS COURT'S PRECEDENT AND VIOLATES THE SUPREMACY CLAUSE.

A state law conflicts with a federal statute, and is void under the Supremacy Clause, if it "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *accord, Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979). The Kansas court's decision permitting a setoff against social security benefits frustrates the operation and purpose of Section 207 in a significant way.

The overall objective of the social security system is "the protection of its beneficiaries from some of the hardships of existence." *United States v. Silk*, 331 U.S. 704, 711 (1947). Section 207 furthers this objective by ensuring that a beneficiary has uninterrupted use of benefits free from the claims of third parties. *Neavear v. Schweiker*, 674 F.2d 1201, 1205-06 (7th Cir. 1982). Social security beneficiaries commonly hold their benefits in bank accounts and frequently receive them by direct deposit from the Social Security Administration. *See Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (en banc). The Kansas setoff procedure, Kan. Stat. Ann. § 9-1206 (1982), as construed by the court below, allows a bank to seize accounts without regard to whether they contain social security funds, thereby authorizing circumvention of Section 207. This procedure is available even if, as in the present case, the intended recipient has no account with the bank and does not even know her benefit payments have found their way into the bank's hands. *Moore v.*

State Bank of Burden, 729 P.2d 1205, 1211 (Kan. 1986). App. A at 9a, 12a. Allowing the bank to use such benefits to satisfy a preexisting debt nullifies the protection of Section 207.

The decision of the Kansas court is directly at odds with this Court's decision in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973). The Court there held that Section 207 prohibits a creditor from reaching social security benefits deposited in a bank account. *Id.* at 416-17. Invoking the Supremacy Clause, the Court invalidated a state's attempt to obtain a judgment against a depositor's social security funds: "[Section 207] imposes a *broad bar* against the use of any legal process to reach *all* social security benefits. That is broad enough to include *all* claimants . . . ." *Id.* at 417 (emphasis added). The decision below cannot be squared with *Philpott* because the Kansas court allowed respondents to elevate their claim as a creditor above petitioner's Section 207 right to be free from all such claims. In fact, it is an even more egregious denial of a recipient's federal rights. In *Philpott*, the state claimed the benefits in a court proceeding. Petitioner's social security benefits were seized without her even being notified by the bank. Such an evasion of Section 207 cannot be allowed to stand.

The *Philpott* Court relied upon an analogy to the veterans' benefits exemption discussed in *Porter v. Aetna Casualty Co.*, 370 U.S. 159 (1962). The Court in *Porter* held that "bank credits" derived from veterans' benefits were exempt from legal process pursuant to 38 U.S.C. § 3101(a) (1982), a statute that mirrors Section 207. The Court stated:

> Since legislation of this type should be liberally construed . . . to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof . . . we feel . . . *deposits such as those in-*

> *volved here should remain inviolate.* The Congress, we believe, intended that veterans in the safekeeping of their benefits should be able to utilize those normal modes adopted by the community for that purpose—provided the benefit funds, regardless of the technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retain the quality of monies, and have not been converted into permanent investments.

370 U.S. at 162 (emphasis added).

Similarly, the purpose of Section 207 is to ensure that social security benefits actually reach the beneficiary and are used for essential services, care and maintenance. *Neavear v. Schweiker*, 674 F.2d 1201, 1205-06 (7th Cir. 1982). Section 207 expressly preempts all law that stands in its way, including all conflicting state law. 42 U.S.C.A. § 407(b) ("no other provision of law . . . may be construed to limit, supersede, or otherwise modify the provisions of this section"). Section 207 must be construed to prevent "the vagaries of state law from disrupting the national scheme," and should guarantee a "national uniformity that enhances the effectiveness of congressional policy." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979). The Kansas court decision disrupts that uniformity by denying petitioner a remedy for respondents' unlawful setoff. It thus "stands as an obstacle" to the "full purposes and objectives" of Section 207. *Hines*, 312 U.S. at 67.[6] The Supremacy Clause demands that the decision be reversed.

---

[6] The Kansas procedure permitting setoffs could withstand examination under the Supremacy Clause if the procedure avoided any significant interruption of access to social security benefits. *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (en banc); *see Hisquierdo*, 439 U.S. at 583. In this case, however, Mrs. Grubb was denied access to her benefits for two months because the bank did not notify her that the funds had arrived. After she learned that her benefits were at the bank, the bank continued to refuse to forward them to her unless she would dismiss her lawsuit.

II. THE KANSAS SUPREME COURT'S RULING CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL AND STATE COURTS.

The decision of the Kansas Supreme Court conflicts with the holdings of four circuit courts that have addressed the issue, as well as the decisions of several district and state courts. These courts have consistently recognized the inviolability of social security benefits under Section 207. In *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (en banc), the Third Circuit invalidated under the Supremacy Clause a Pennsylvania law permitting a postjudgment garnishment of bank accounts containing social security benefits. The court held that the Pennsylvania statute impermissibly conflicted with the Section 207 exemption:

> A bank account may well contain the money that a person needs for food, shelter, health care and other basic requirements of life. Many people have no other immediate sources of money. Additional income from a future paycheck, welfare benefit, or other source may not be available for two weeks or more, and that income may be insufficient to meet the person's immediate needs. When one considers the additional fact that the money in the accounts may, as here, be covered by exemptions designed to protect the debtor's means of purchasing basic necessities, the debtor's interest in access to a bank account becomes very compelling.

Id. at 58; *see also Department of Health and Rehabilitative Services v. Davis*, 616 F.2d 828, 831 (5th Cir. 1980) (purpose of Section 207 is to protect social security beneficiaries from claims of creditors); *French v. Michigan Dept. of Social Services*, 285 N.W.2d 427 (Mich. 1979) (same). The First Circuit, in ruling upon Rhode Island's postjudgment garnishment statute, also held that social security funds deposited in a bank account are entitled to the Section 207 exemption. The court invalidated Rhode Island's postjudgment garnishment scheme be-

cause it did not give recipients appropriate notice and sufficient opportunity to assert the exemption. *Dionne v. Bouley*, 757 F.2d 1344 (1st Cir. 1985).

If a postjudgment remedy against social security benefits is forbidden by Section 207, *a fortiori* respondents' exercise of a prejudgment self-help remedy must be struck down. One can hardly imagine a greater intrusion on a "compelling" federal interest, *see Finberg*, 634 F.2d at 58, than the secret exercising of a state-granted right to override an important federal exemption. *Cf. North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (prejudgment garnishment procedure allowing seizure of bank account without notice violates due process).

The Sixth Circuit, in an analogous case, refused to find an exception to the anti-alienation provisions of ERISA, 29 U.S.C. § 1056(d) (1982), and held that any exception to an anti-alienation provision must come from Congress. *United Metal Products Corp. v. National Bank of Detroit*, 811 F.2d 297 (6th Cir. 1987). Even though the plaintiff presented a "most appealing" case for creation of an implied fraud exception to anti-alienation laws, the court held that "whether an exception should be created is a question for legislative rather than judicial judgment." *Id.* at 300, *citing United States v. Rutherford*, 442 U.S. 544, 559 (1979). The Kansas court here has implied such an exception by denying petitioner a remedy for respondents' unlawful setoff. It did so not only in the absence of authority from Congress but in the face of Congress' express admonition in its 1983 amendment that "no other provision of law . . . may be construed to limit, supersede or otherwise modify the provisions of this section." 42 U.S.C.A. § 407(b) (West 1983).

Decisions of lower federal courts have reached similar conclusions. In *Neeley v. Century Finance Co. of Arizona*, 606 F. Supp. 1453 (D. Ariz. 1985), plaintiffs in a class action sued various defendants alleging that Ari-

zona's postjudgment garnishment procedure violated the Supremacy Clause. The court held the procedure unconstitutional because the plaintiffs' assets were protected by federal exemption statutes and garnishment would create "excessive interference with congressional objectives." *Id.* at 1469. In *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y. 1983), the court held that Section 207 prohibits the Social Security Administration from reducing payments to beneficiaries in order to recover supplemental security income overpayments, even if the reductions are made with the consent of the beneficiaries. *Id.* at 599. Discussing the 1983 amendment to Section 207, the court held: "Congress' clear and stringent interpretation of the prohibition on transfer or assignment of benefits in Section 207(b) . . . compels us to strictly interpret that clause to prohibit voluntary as well as involuntary transfers or assignment." *Id.* Thus, even if Mrs. Grubb had notified respondents that her benefit checks would be forthcoming and that she would voluntarily assign them, such an assignment would have been void.

In *Demp v. Emerson Enterprises*, 504 F. Supp. 281 (E.D.Pa. 1980), the plaintiff sued several defendants, including her landlord, for recovery of social security benefits that were taken by garnishment of her bank account to satisfy a judgment she alleged to be invalid. The bank account consisted almost entirely of social security funds which were the plaintiff's sole source of income. The court held that if the funds were taken under color of state law, Section 207 would be violated. *Id.* at 284. Similarly, in *Anderson v. First National Bank of Atlanta*, 206 S.E.2d 501 (Ga. App. 1979), the court held that funds in a bank account consisting of proceeds of social security benefits were "monies paid within Section 207." The funds were exempt from garnishment even though the account was a joint one upon which the judgment debtor or his sister could make withdrawals. *Id.* at 501-02. In the present case, Mrs. Grubb did not have

the option of writing a check to obtain the bank account balance because she had closed her account two years earlier and was not informed that her benefits had been mistakenly sent to respondents.

State courts have also strictly construed exemption statutes. In *Kruger v. Wells Fargo Bank*, 521 P.2d 441 (Cal. 1974), a bank claimed a setoff against a deposit of state disability and unemployment compensation, which were exempt by a state statute similar to Section 207. In an action against the bank by the intended beneficiary for conversion of the funds, the court held for the beneficiary, rejecting an identical position taken by respondents in the court below:

> The [bank] points out that the banker's set-off is not an attachment or execution, thus, does not contravene the specific prohibitions of the exemption statutes. It then leaps to the conclusion that it may exercise a set-off against exempt deposits. This conclusion rests on the implicit but mistaken assumption that a creditor's right of set-off is absolute except when explicitly limited by statute.

Id. at 450-51. In invalidating the setoff, the *Kruger* court relied on *Finance Acceptance Co. v. Breaux*, 419 P.2d 955 (Colo. 1966), a case in which a setoff against wages was struck down because wages were exempt from garnishment or attachment. The Colorado Supreme Court held:

> The whole spirit of these acts is such that it was intended to protect the exempt property from all manner of coercive process of the law, and not merely . . . from seizure by means of the process technically known as attachment, execution, or garnishment, but to preserve them for the benefit of his family against any appropriation for the payment of his debts not authorized by law to which he does not consent. *To allow a set-off would in most cases result in a palpable evasion of the law.* The general rule seems to be that in such cases, the right to ex-

> emption will be respected and protected without regard to the right of offset and that the creditor will not be permitted to defeat the exemption by setting up a demand against the debtor's claim, even though such demand would otherwise be good as a counterclaim or setoff.

Id. at 957-58.[7] The court stated that a violation of such an exemption could be enforced by an action for conversion of the exempt property, the proposition rejected by the Kansas court here. *Id.* at 958. *See also First National Bank of Cushing v. Funnell*, 290 P. 177 (Okla. 1930) (bank setoff not permitted against deposit of exempt life insurance proceeds).

In sum, the Kansas Supreme Court has departed from substantial precedent by denying petitioner a cause of action against respondents for unlawfully taking social security benefits in violation of Section 207. Unless the decision is reversed, exempt government entitlements in Kansas have lost a vital protection Congress intended to guarantee.

CONCLUSION

The Kansas Supreme Court has taken the extraordinary step of allowing Kansas banking law to override petitioner's federal right not to have social security benefits seized by a third party. The decision is out of line with holdings of this Court and other courts construing Section 207 and similar protective statutes. By denying recovery for respondents' unlawful taking of petitioner's benefits, the court has violated an express prohibition of the Social Security Act, 42 U.S.C.A. § 407(b) (West 1983), and has undermined Congress' purpose of insulat-

---

[7] Other courts have held that creditors cannot recover the proceeds of social security payments from a savings or checking account because such funds are exempt from legal process. *Household Finance Corp. v. Chase Manhattan Bank*, 395 N.Y.S.2d 564 (1977); *Matter of Vary's Estate*, 237 N.W.2d 498 (Mich. App. 1975); *Century Indemnity Co. v. Mead*, 159 A.2d 325 (Vt. 1960).

ing social security benefits from the claims of creditors. The Supremacy Clause demands that the judgment be reversed.

For all of the foregoing reasons, a writ of certiorari should issue, and the judgment and opinion of the Kansas Supreme Court should be reversed by this Court.

Respectfully submitted,

STEVEN L. CRANFORD
Counsel of Record
9920 East Harry
Wichita, Kansas 67207
(316) 689-4100

JAMES P. NEHF
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5300
Counsel for Petitioner

DATED: April 24, 1987

APPENDICES

APPENDIX A

SUPREME COURT OF THE STATE OF KANSAS

(Dec. 5, 1986)

No. 59,132

RODNEY A. MOORE, next of kin of KATHLEEN A. GRUBB, Deceased, and Administrator of the Estate of KATHLEEN A. GRUBB, Deceased,

Appellant,

v.

THE STATE BANK OF BURDEN, A Kansas Banking Corporation; WAYNE E. TEMPLE and RUBY M. TEMPLE; both Individuals,

Appellees.

SYLLABUS BY THE COURT

1.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The benefit of all inferences which may be drawn from the admitted facts must be given to the party against whom judgment is sought. When summary judgment is challenged on appeal, an appellate court must read the record in the light most favorable to the party who defended against the motion for summary judgment.

2.

This court has defined conversion as the unauthorized assumption or exercise of the right of ownership over

goods or personal chattels belonging to another to the exclusion of the other's rights. Generally an action for conversion will not lie for the recovery of an ordinary debt or account. It is well recognized that the relationship between a general depositor and his or her bank is that of creditor and debtor, and money deposited, unless segregated into a special account and designated to be kept separate, becomes the property of the bank.

3.

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another may be liable for such emotional distress based upon what has come to be referred to as the tort of outrage. To establish such a cause of action, proof of four elements is required: (1) The conduct of the defendant must be intentional or in reckless disregard of the plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the defendant's conduct and the plaintiff's mental distress; and (4) the plaintiff's mental distress must be extreme and severe.

4.

Conduct sufficient to support an action for outrageous conduct must be beyond the bounds of decency and utterly intolerable in a civilized society.

5.

Liability for extreme emotional distress has two threshold requirements which must be met and which the court must, in the first instance, determine: (1) Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) whether the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it.

6.

Some of the rules relating to determination of fraud are stated and applied.

7.

It is well settled that punitive damages are imposed to punish a wrongdoer for malicious, vindictive, or willful and wanton invasion of the plaintiff's rights, with the purpose being to restrain and deter others from the commission of like wrongs. An award of punitive damages, which generally requires an award of actual damages, is not designed to compensate the plaintiff for the wrong. No one has the right to maintain an action for the mere purpose of inflicting punishment upon a wrongdoer, and if a party has no cause of action independent of his claim for punitive damages he has no cause of action at all.

Appeal from Cowley district court, DAVID S. LORD, judge. Opinion filed December 5, 1986. Affirmed.

Steven L. Cranford, of Wichita, argued the cause and *P. David Egan*, of Wichita, was with him on the briefs for appellant.

Steven D. Gough, of Kahrs, Nelson, Fanning, Hite & Kellogg, of Wichita, argued the cause and *Linda S. Parks*, of the same firm, was with him on the brief for appellees.

The opinion of the court was delivered by

HOLMES, J.: Rodney A. Moore, administrator of the estate of Kathleen A. Grubb, appeals from an order of summary judgment granted in favor of the defendants, The Kansas State Bank of Burden (Bank), Wayne E. Temple, and Ruby M. Temple, in an action based upon an alleged illegal setoff of funds by the Bank.

On August 10, 1983, Kathleen A. Grubb filed a petition naming the Bank and Wayne E. Temple, its president, as defendants. She contended that the Bank had

illegally declared a setoff against certain Social Security funds in the amount of $504.00 transmitted to the Bank for credit to the account of Mrs. Grubb. At the time of the setoff she was in default upon an automobile loan owed the Bank in the amount of $358.78 plus interest. The amount set off by the Bank from the funds of Mrs. Grubb was $447.18, which included interest to the date of setoff. The original petition asserted three causes of action based upon fraud, conversion, and the tort of outrage.

Thereafter, on November 4, 1983, Mrs. Grubb filed an action, based upon the same factual allegations, in the United States District Court for the District of Kansas, against the same two defendants and Ruby M. Temple, who was also an officer of the Bank. Subsequently, a first amended complaint was filed in the federal court action by Rodney A. Moore, in his alleged representative capacity, asserting causes of action based upon fraud, conversion, outrage, invasion of privacy; and violations of the Kansas Uniform Commercial Code, the Kansas Uniform Consumer Credit Code, the Kansas Consumer Protection Act, the federal Social Security Act, the federal Electronic Funds Transfer Act, and the Racketeer Influenced and Corrupt Organizations Act. In each case the plaintiff sought damages of nearly $1,400,000.00.

Mrs. Grubb died December 15, 1983, and thereafter this action appears to have been carried on by Rodney A. Moore as "next of kin of Kathleen A. Grubb, Deceased, and Administrator of the Estate of Kathleen A. Grubb, Deceased" although the record does not reflect that he was ever properly substituted as the party plaintiff or that there was any attempt to comply with the provisions of K.S.A. 60-225 and 60-269. On January 28, 1985, a pretrial questionnaire was filed in the Cowley County District Court action in which the appellant stated, "If this action is ultimately prosecuted [in the

Cowley District Court], amendments to the pleadings will be made to conform to the Complaint filed in U.S. District Court, copy attached." The record before us does not reflect that any amended petition was ever filed or that Ruby M. Temple was ever made a party defendant in this action. However, the trial court and the parties appear to have proceeded upon all the various theories asserted in the federal court action. It was agreed by the parties that discovery would be pursued in the federal court action and that all such discovery would also be utilized in the state court action. Following completion of the federal court discovery, the defendants moved for summary judgment in this case while Rodney A. Moore moved to have the action dismissed without prejudice.

The trial court, in its memorandum opinion, greatly condensed the facts, stating:

> "In April, 1978, the State Bank of Burden made a loan to Kathleen A. Grubb. At this same time, Ms. Grubb opened a checking account with the bank. Ms. Grubb received Veteran Administration and Social Security benefits on a monthly basis. She signed authorizations for both agencies to make direct deposits of these funds to her checking account with the Burden bank. Apparently there is no record of these ever being affirmatively revoked.
>
> "In July, 1979, Ms. Grubb was extended another loan by the bank for the purchase of a car. Later, in July 1981, this car was involved in an accident. Ms. Grubb had failed to maintain insurance coverage to cover the loan. In approximately September, 1981, Ms. Grubb defaulted on the outstanding note. At that time there was $358.78 principal balance remaining. It is disputed if notice of default was given to the debtor. There followed a period of time that the checking account was not used.

"In July, 1983, the bank received, through its ordinary course of business, a wire transfer of $252.00 to be applied to Ms. Grubb's account. The source of the transfer was the Social Security Administration. In August the bank received another such transfer. These were credited to Ms. Grubb's old checking account.

"Although not indicated as such on any document, the original Social Security funds were widow's benefits for the support of a minor child, whereas the funds received in 1983 were benefits for Ms. Grubb's disability.

"No bank statement concerning this wire transfer was sent to Ms. Grubb in July, 1983. Ms. Grubb discovered where her July and August payments had been sent and contacted the bank by telephone demanding they be sent to her. She was advised by the bank's Vice President that it might exercise its right of set-off. (K.S.A. 9-1206.)

"The next day, August 5, 1983, Ms. Grubb's attorney again made demand for the money. The bank conferred with its attorney and was advised it could legally exercise the set-off. On August 8 or 9, the bank set-off $447.18 and sent a statement to Ms. Grubb reflecting that transaction. On August 31, 1983, statements for July and August were sent to plaintiff."

The court then granted the defendant's motion for summary judgment on the tort claims of the plaintiff based upon conversion, invasion of privacy, outrageous conduct, and fraud, and also as to plaintiff's claim for punitive damages. The plaintiff's motion to dismiss the action without prejudice as to the claims based upon alleged violations of the Kansas Uniform Commercial Code, the Kansas Consumer Protection Act, the Social Security Act, the Electronic Funds Transfer Act, the Racketeer

Influenced and Corrupt Organizations Act, and the Kansas Uniform Consumer Credit Code was sustained. Rodney A. Moore has appealed the granting of partial summary judgment on behalf of the defendants.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Peoples Nat'l Bank & Trust v. Excel Corp.*, 236 Kan. 687, 695, 695 P.2d 444 (1985). The benefit of all inferences which may be drawn from the admitted facts must be given to the party against whom judgment is sought. *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 238 Kan. 384, 390, 710 P.2d 1297 (1985). When summary judgment is challenged on appeal, an appellate court must read the record in the light most favorable to the party who defended against the motion for summary judgment. *McAlister v. Atlantic Richfield Co.*, 233 Kan. 252, Syl. ¶ 4, 662 P.2d 1203 (1983).

In the case at bar the record indicates both parties responded to a pretrial questionnaire in the case. In addition, the defendants' memorandum in support of their motion for summary judgment sets out extensive uncontroverted facts. In appellant's response to the motion for summary judgment, he disagreed over several details but substantially agreed with the material facts as propounded by the defendants. Thus, while some facts remain controverted, the material facts essential to resolution of this case appear settled, and the only issue before this court is whether summary judgment was proper.

The first cause of action on which the trial court entered summary judgment in favor of the defendants was that for conversion. This court has defined conversion as the unauthorized assumption or exercise of the right

of ownership over goods or personal chattels belonging to another to the exclusion of the other's rights. *Carmichael v. Halstead Nursing Center, Ltd.*, 237 Kan. 495, Syl. ¶ 2, 701 P.2d 934 (1985). Generally, an action for conversion will not lie for the recovery of an ordinary debt or account. *Temmen v. Kent-Brown Chev. Co.*, 227 Kan. 45, Syl. ¶ 3, 605 P.2d 95 (1980). It is well recognized that the relationship between a general depositor and his or her bank is that of creditor and debtor, and money deposited, unless segregated into a special account and designated to be kept separate, becomes the property of the bank. *Chilson v. Capital Bank of Miami*, 237 Kan. 442, 444, 701 P.2d 903 (1985). Therefore, unless intended to remain separate, money deposited in a bank ordinarily cannot be the subject of an action for conversion. *E.g., Baker Administrator v. Brial*, 185 Kan. 322, 341 P.2d 987 (1959); Annot., 44 A.L.R.2d 927 § 7(c), p. 943.

One of the facts in dispute was whether Mrs. Grubb had closed her checking account in 1981 following her dispute with the Bank over further payment on her wrecked automobile. When the Bank received, in July and August 1983, an electronic transfer of funds from the Social Security Administration for credit to Mrs. Grubb, the Bank credited her checking account, which had been inactive since 1981 and which had evidently carried a zero balance since that time. The Bank contended the account had never been actually closed by Mrs. Grubb. We find the issue of whether or not the account was closed in 1981 to be immaterial to a determination of the issues here. If the account remained open and the funds were credited to it, as the Bank contends, then a creditor-debtor relationship was created at that time. By the same token, even if the account was closed, when the Bank received the electronic transfer of funds from Social Security, the same relationship arose. The Bank was credited with funds for Mrs. Grubb, a former depositor, and the relationship of creditor and debtor

again prevailed. It appears to be the contention of appellant that as the account of Mrs. Grubb was closed and as the Social Security payments are exempt from setoff, the Bank converted those funds when it did not forthwith transfer them to Mrs. Grubb.

We do not deem it necessary under the facts of this case to determine whether Social Security funds deposited with a bank are exempt under 42 U.S.C. § 407 (1982) from a setoff by the Bank in reliance upon K.S.A. 9-1206. Assuming, arguendo, that such funds are not subject to setoff, the erroneous application of the funds to the past-due debt owed the Bank does not constitute conversion under the facts of this case. Upon receipt of the notification from Social Security, the debtor-creditor relationship was created between the Bank and Mrs. Grubb and, as previously pointed out, the failure of the debtor to pay over such funds to the creditor does not ordinarily constitute conversion. While in certain instances there may be a conversion of commercial paper. *Carmichael v. Halstead Nursing Center, Ltd.*, 237 Kan. 495, Syl. ¶ 3, 701 P.2d 934 (1985), or conversion of funds in a depositor's account if the bank knows the funds are the property of a third party, *Iola State Bank v. Bolan*, 235 Kan. 175, Syl. ¶ 8, 679 P.2d 720 (1984), those situations are not applicable to the present case. Here, the Bank did not receive checks from Social Security payable to Mrs. Grubb which it converted to its own use, nor did the funds belong to a third party. We conclude that the trial court was correct in its determination that a debtor-creditor relationship existed between the Bank and Mrs. Grubb and that the proper action was one in contract rather than conversion.

Next, appellant asserts error in the trial court's determination that there were no facts supporting a claim based upon the tort of outrage.

It has been recognized in Kansas that one who by extreme and outrageous conduct intentionally or recklessly

causes severe emotional distress to another may be liable for such emotional distress based upon what has come to be referred to as the tort of outrage. *Neufeldt v. L.R. Foy Const. Co.*, 236 Kan. 664, Syl. ¶ 2, 693 P.2d 1194 (1985); *Dawson v. Associates Financial Services Co.*, 215 Kan. 814, Syl. ¶ 1, 529 P.2d 104 (1974). To establish such a cause of action, proof of four elements is required: (1) The conduct of the defendant must be intentional or in reckless disregard of the plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the defendant's conduct and the plaintiff's mental distress; and (4) the plaintiff's mental distress must be extreme and severe. *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, Syl. ¶ 3, 662 P.2d 1214 (1983). Conduct sufficient to support an action for outrageous conduct must be beyond the bounds of decency and utterly intolerable in a civilized society. *Neufeldt v. L. R. Foy Const. Co.*, 236 Kan. 664, 669, 693 P.2d 1194 (1985). Liability for extreme emotional distress has two threshold requirements which must be met and which the court must, in the first instance, determine: (1) Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) whether the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it. *Roberts v. Saylor*, 230 Kan. 289, Syl. ¶ 2, 637 P.2d 1175 (1981). Here, while there was some testimony by Mrs. Grubb in her deposition to the effect she was physically and mentally upset by the Bank's declared setoff of funds, there is no evidence to support any finding of outrageous conduct on the part of the officials of the Bank. The most that can be said is that the Bank may have made an erroneous setoff of the Social Security funds against a legitimate indebtedness owed to the Bank. Such action was done only after consultation with counsel and without any showing of any intent to injure

Mrs. Grubb, or a reckless disregard of her. The trial court was correct in granting summary judgment on this issue.

Appellant's third claim is that the trial court erred in granting summary judgment upon the claim of fraud.

The broad outlines of fraud are said to include any cunning, deception, or artifice used, in violation of legal or equitable duty, to circumvent, cheat, or deceive another. The forms it may assume and the means by which it may be practiced are as multifarious as human ingenuity can devise, and the courts consider it unwise or impossible to formulate an exact, definite, and all-inclusive definition of the action. It is synonymous with, or closely allied to, other terms indicating positive and intentional wrongdoing, but is distinguishable from mistake and negligence. *Citizens State Bank v. Gilmore*, 226 Kan. 662, Syl. ¶ 2, 603 P.2d 605 (1979). Actual fraud is an intentional fraud, and the intent to deceive is an essential element of the action. Constructive fraud, however, is a breach of a legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or violate a confidence, and neither actual dishonesty of purpose or intent to deceive is necessary. *Andres v. Claassen*, 238 Kan. 732, Syl. ¶ 2, 714 P.2d 963 (1986). A suppression or concealment of the truth is not at all times such fraud or deceit as will be relieved against. *DuShane v. Union Nat'l Bank*, 223 Kan. 755, 760, 576 P.2d 674 (1978). There must be a concealment of facts which the party is under a legal or equitable duty to communicate and in respect of which he could not be innocently silent. *DuShane v. Union Nat'l Bank*, 223 Kan. at 759.

Here, the Bank in July 1983 received a notification of the electronic transfer of $252.00 from the Social Security Administration for the benefit or account of Mrs. Grubb. Appellant's principal argument seems to be that

the failure to notify Mrs. Grubb of the receipt of the first funds in July 1983 and the failure to mail her a bank statement that month constituted fraud by concealment. Testimony of the Bank's employees was to the effect they thought the transfer had been made in error because no previous funds had been received since 1981. They fully expected to receive a notification that the transaction was being reversed and, as a result, failed to immediately notify Mrs. Grubb. They then simply forgot about it until a similar notification was received in August 1983 for an additional $252.00. The Bank officers then checked into the matter, found the outstanding past-due note of Mrs. Grubb, and notified her they would set off the debt against the funds received. Such a determination was made only after consultation with legal counsel, who advised they had the right to declare such a setoff. It appears from the record that within a matter of a few days after declaring the setoff, officials of the Bank offered to pay the entire $504.00 if Mrs. Grubb would return the loan papers which had been marked paid and mailed to her when the setoff was declared. Evidently this offer was refused by Mrs. Grubb or her legal counsel. It is argued that the Bank intentionally withheld mailing a July statement which would show receipt of $252.00 in order to receive the August Social Security payment which would result in the Bank having sufficient funds on hand to pay the entire indebtedness of Mrs. Grubb. The problem with this argument is there is absolutely no evidence to support it. It is based solely upon conjecture and speculation that the Bank intended to defraud Mrs. Grubb while all the evidence is to the contrary. The very most that can be made of the Bank's actions is that its employees made a mistake and were possibly negligent in doing so. Under the evidence as disclosed by the record here, the failure to mail a July 1983 bank statement falls far short of a fraudulent failure to disclose that information to Mrs. Grubb. The other arguments relative to the claim of fraud have been

carefully considered and are equally without merit. No error on the claim for fraud is shown.

Next, it is contended that the court erred in granting sumary judgment on the issue of a claim for punitive damages. It is well settled that punitive damages are imposed to punish a wrongdoer for malicious, vindictive, or willful and wanton invasion of the plaintiff's rights with the purpose being to restrain and deter others from the commission of like wrongs. *McDermott v. Kansas Public Serv. Co.*, 238 Kan. 462, Syl. ¶ 1, 712 P.2d 1199 (1986). An award of punitive damages, which generally requires an award of actual damages, is not designed to compensate the plaintiff for the wrong. *McDermott v. Kansas Public Serv. Co.*, 238 Kan. 462, 464. No one has the right to maintain a civil action for the mere purpose of inflicting punishment upon a wrongdoer, and if a party has no cause of action independent of his claim for punitive damages, he has no cause of action at all. *Sondegard v. Martin*, 83 Kan. 275, 277, 111 Pac. 442 (1910). Having determined that the court was correct in its rulings on the tort claims asserted as a basis for recovery, it follows that there is no independent cause of action for punitive damages.

The final issue raised is the claim that the procedure followed by the trial court in entering summary judgment was improper. This issue is based on the fact that the trial court, at the time it granted summary judgment for the defendants, apparently did not have copies of the discovery depositions to review. The depositions had been taken in the federal court action and evidently neither party saw fit to have copies of the depositions filed in this action until after the decision of the trial court. The trial court's original decision was filed June 12, 1985. The record reflects a motion for reconsideration, pointing out the lack of depositions and other issues, was filed and heard on June 13, 1985. The federal court depositions were then filed with the trial court on June 28,

1985. On July 31, 1985, the trial court's decision on the motion for reconsideration was filed in which an earlier ruling pertaining to one of the federal court claims was changed, but the prior summary judgment rulings were affirmed. On August 9, 1985, a motion to vacate the prior orders was filed in which the issue relating to the availability of the federal court depositions was again asserted. This motion was overruled in a written decision filed January 15, 1986. The court addressed the state of the record in detail and specifically pointed out that the depositions were part of the record. It is noted the copies of the depositions had been part of the record for over a month prior to the ruling on the first motion to reconsider the decisions of June 12, 1985. The depositions are also part of the record in this appeal.

In the case at bar appellant relies heavily on *Timmermeyer v. Brack*, 196 Kan. 481, 412 P.2d 984 (1966), in support of his position. In *Timmermeyer* the trial court entered summary judgment on a claim based largely on counsel's description of how his various witnesses would testify. This court reversed the trial court judgment, stating:

> "The district court should not determine factual issues on considering the propriety of a summary judgment, but should search the record for the purpose of determining whether a factual issue exists. Certainly whether a factual issue exists should not be determined from the statements of counsel, seeking summary judgment, as to what certain witnesses will testify to when the testimony is not of record.
>
> "The record discloses there are material facts to present which leaves remaining a genuine issue of a material fact. Summary judgment was, therefore, erroneously entered." 196 Kan. at 484.

In the present case, unlike *Timmermeyer*, it appears that the record, as it existed at the time summary judg-

ment was entered, indicated there were no significant material issues of fact which remained controverted. The litigants had each filed responses to pretrial questionnaires and legal memorandums outlining the factual situation and law as it pertained to summary judgment. In these memorandums all parties made reference to the depositions that are now complained of as not being included in the record. While certain facts remained controverted, none of those were material to the ultimate determination of the claims being asserted against the Bank. We conclude that the trial court correctly entered summary judgment in this case based on the uncontroverted material facts and the existing law, regardless of the absence of the discovery depositions in the record. Any error which may have resulted from the failure of the trial court to have copies of the depositions at the time of its first ruling is harmless at best. See *City of Ottawa v. Heathman*, 236 Kan. 417, 426, 690 P.2d 1375 (1984).

The judgment is affirmed.

APPENDIX B

IN THE DISTRICT COURT
OF COWLEY COUNTY, KANSAS
SITTING IN ARKANSAS CITY

(Filed Pursuant to K.S.A. Ch. 60)

No. 83-C55-AC

KATHLEEN A. GRUBB,
Plaintiff

VS

THE STATE BANK OF BURDEN,
a Kansas banking corporation;
and WAYNE E. TIMPLE [*sic*], an individual,
Defendants

[Filed June 12, 1985]

DECISION OF THE COURT

In April, 1978, the State Bank of Burden made a loan to Kathleen A. Grubb. At this same time, Ms. Grubb opened a checking account with the bank. Ms. Grubb received Veteran Administration and Social Security benefits on a monthly basis. She signed authorizations for both agencies to make direct deposits of these funds to her checking account with the Burden bank. Apparently there is no record of these ever being affirmatively revoked.

In July, 1979, Ms. Grubb was extended another loan by the bank for the purchase of a car. Later, in July 1981, this car was involved in an accident. Ms. Grubb had failed to maintain insurance coverage to cover the loan. In approximately September, 1981, Ms. Grubb defaulted on the oustanding note. At that time there was $358.78 principal balance remaining. It is disputed if notice of default was given to the debtor. There followed a period of time that the checking account was not used.

In July, 1983, the bank received, through its ordinary course of business, a wire transfer of $252.00 to be applied to Ms. Grubb's account. The source of the transfer was the Social Security Administration. In August the bank received another such transfer. These were credited to Ms. Grubb's old checking account.

Although not indicated as such on any document, the original Social Security funds were widow's benefits for the support of a minor child, whereas the funds received in 1983 were benefits for Ms. Grubb's disability.

No bank statement concerning this wire transfer was sent to Ms. Grubb in July, 1983. Ms. Grubb discovered where her July and August payments had been sent and contacted the bank by telephone demanding they be sent to her. She was advised by the bank's Vice President that it might exercise its right of set-off. (K.S.A. 9-1206)

The next day, August 5, 1983, Ms. Grubb's attorney again made demand for the money. The bank conferred with its attorney and was advised if [it] could legally exercise the set-off. On August 8 or 9, the bank set-off $447.18 and sent a statement to Ms. Grubb reflecting that transaction. On August 31, 1983, statements for July and August were sent to plaintiff.

The State Bank of Burden has not at any applicable time had assets of $25,000,000.

CONCLUSIONS

Electronic Funds Transfer Act

The bank claims that the provisions of the Electronic Funds Transfer Act are not applicable to it through a special exclusionary provision. The regulation relied upon states:

This Act and this regulation do not apply to the following:

> Any preauthorized transfer to or from an account if the assets of the account holding financial institution are $25,000,000 or less on December 31 (of the year in question).

The uncontroverted evidence before the court shows that the assets were less than $25,000,000 and that there was a preauthorized transfer by Ms. Grubb. However, there remains the question of whether or not there was in fact an account in existence at the time the funds were received. Plaintiff claims the account had been closed. The resolution of this factual question must remain with the jury. The jury's answer to this special question will determine the applicability of this Act.

Racketeering Influenced and Corrupt Organizations Act

The bank claims that the RICO Act does not apply to the present case. Before a claim can be established under RICO the following eight elements must exist:

1. The defendant;
2. By the commission of two or more of the listed predicate acts;
3. Constituting a "pattern";
4. Of "racketeering activity";
5. Directly or indirectly invests in, or has an interest in, or participates in the conduct of;

6. An "enterprise";
7. The activities of which affect interstate or foreign commerce; and
8. The plaintiff was injured in his or her business or property by reason of such conduct.

The racketeering activity alleged by plaintiff is that of fraud by wire or mail. There cannot be any basis for the offense of wire fraud since there were no interstate telephone conversations as opposed to intrastate calls. There also is no showing of any scheme to defraud in any of the telephone conversations. The only evidence is that the bank advised Ms. Grubb it had received the transfers and was intending to apply them toward an overdue note as a set-off. The bank thought this to be their legal right.

Further, the bank had not committed any wire fraud in relation to the funds received by the Electronic Funds Transfer Act. The bank did not transmit or cause the transmission of the funds. The initiating party was the Social Security Administration.

Likewise, there is no evidence to support a claim of mail fraud. The statements and notices sent by the bank to Ms. Grubb were evidences of the bank's activity. Fraud denotes a wilful misrepresentation. There is no evidence in the facts presented to substantiate a claim of fraud or of a scheme of fraud.

The additional element of enterprise is lacking. There is no entity alleged by the plaintiff to exist which is distinct from the defendant bank and which the bank is alleged to have invested. If there is no alleged enterprise, there cannot be a violation of RICO.

In this regard, plaintiff's best evidence is that the bank consulted with its attorney on a legal issue and then acted pursuant to that advice. There is no other entity of *any* nature alleged to exist. This case is clearly distinguishable from the situation in the Maxwell case urged

by plaintiff. *Maxwell vs. Southwest National Bank* 593 Fed. Supp. 250.

Social Security Act

The bank claims that its right of set-off pursuant to K.S.A. 9-1206 exists irregardless of the provisions of the Social Security Act. The pertinent federal statute is 42 USCA 407. It provides:

> "The right of any person to any future payment under this subchapter shall not be transferrable or assignable, at law or in equity, and none of the monies paid or payable or rights existing under this sub-chapter shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency law."

Obviously the language of the statute is in reference to legal or judicial process. Therefore, the posture of the bank's rights of set-off are not directly addressed.

However, the purpose of the exemption is to protect the benefits of the recipient and those dependent on him from claims of creditors. *French vs. Director, Michigan Department of Social Services* 285 NW2d 247. In order to preserve this spirit, the creditor bank should not be given any greater right to seize the recipient's benefits than other creditors. The mere fact that the recipient has a checking account with a creditor bank cannot be a justification for restricting the otherwise blanket exemption.

Action in Tort or Contract

A—Conversion:

The bank claims that the tort of conversion cannot lie in the instant case because there is a debtor-creditor relationship between it and Ms. Grubb. The law is clear that a bank cannot commit conversion of its depositor's funds since they are in a debtor-creditor relationship. The plaintiff contends this was not their relationship since

the account had been closed prior to the transfers of 1983. The money was transferred to the bank due to the action or inaction of Ms. Grubb. The bank had no part in this. Once the funds had been transferred to the bank to be credited to Ms. Grubb's account the debtor-creditor relationship existed. The bank owed the money to Ms. Grubb and was indebted to her to that exten[t]. There would have been no problem had there not been the prior outstanding note. Because of this, the problem of set-off arose. This matter of set-off only clouds the issue of what would otherwise have been clearly a simple debtor-creditor or bank-depositor relationship. The matters between the parties are ones of contract and not the tort of conversion.

B—Inva[s]ion of the Right of Privacy:

For there to be a claim of invasion of the right of privacy there must be a showing of intrusion upon seclusion. The Kansas Supreme Court has defined this as follows in *Froelich vs. Adair* 213 Kan. 357.

> "One who intentionally intrudes, physically or otherwise, upon the solitude of seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man."

The question as to whether the intrusion would be highly offensive to a reasonable man is initially for the court to determine. In reviewing the factual contentions and uncontroverted facts, I cannot discern any foundation for a claim of such invasion.

C—Outrageous Conduct:

The tort of outrageous conduct is to be actionable as a matter of law only in those cases where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond the bounds of decency, and to be

regarded as atrocious and utterly intolerable in a civilized society. *Roberts vs. Saylor* 230 Kan. 289.

In the case at bar there are no allegations of language or gestures that would support this claim of outrageous conduct as defined above. Plaintiff's best claim is that social security funds were used to off-set an old loan and that these funds were needed for the care of a cancer inflicted woman. The evidence also shows that the bank acted on its attorney's advice that the set-off was valid and appropriate. Even though I find that this set-off was not proper, I cannot say the bank acted outrageously under the circumstances. This is initially a question of law for the court and I find that the claim of outrageous conduct must be denied.

D—Fraud:

Has a *prima facie* case of fraud been presented by plaintiff so that this issue should be presented to the jury? The elements of fraud are:

1. That false representations were made as a statement of existing and material fact.
2. That the representations were known to be false by the party making them, or were recklessly made without knowledge concerning them.
3. That the representations were intentionally made for the purpose of inducing another party to act upon them.
4. That the other party reasonably relied and acted upon the representations made.
5. That the other party sustained damage by relying upon them.

Plaintiff claims fraud by the bank in failing to timely send the July statement to Ms. Grubb. This is contended to be an intentional concealment of facts. Silence or omis-

sions may be grounds for fraud under proper circumstances. The key to plaintiff's assertion is "intentional concealment".

What does a review of the uncontroverted contentions reveal? There is perhaps evidence of negligence and neglect in not sending the July statement. However, it would be pure conjecture to say such action was an intentional act by the bank employees designed to mislead or misinform Ms. Grubb. There is no evidence of any intentional misrepresentation or omission by the bank or its employees. Therefore, there is no *prima facie* case of fraud and claims pursuant thereto must be denied.

E—Punitive Damages:

For punitive damages to be maintained there must be a separate action in tort. Those remaining in this case appear to be based in contract. Therefore, the damages plaintiff may assert are limited to pecuniary losses sustained in addition to any statutorially applicable special damages. In the absence of common law action in tort, there is no basis for exemplary or punitive damages.

THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that the motion for summary judgment is sustained in reference to recovery pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) and in reference to the common law torts of conversion, invasion of privacy, outrageous conduct and fraud. The motion for summary judgment is overruled in reference to actions pursuant to the Electronic Fund Transfers Act and violations of the Social Security Act exemption provision.

/s/ David S. Lord
DAVID S. LORD
Judge of the District Court

[SEAL]

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 86-59132-AS

RODNEY A. MOORE,
next of kin of KATHLEEN A. GRUBB, Deceased, *et al.*,
Appellants,

v.

THE STATE BANK OF BURDEN,
a Kansas Banking Corporation, *et al.*,
Appellees.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date January 24, 1987

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 86-59132-AS

RODNEY A. MOORE,
next of kin of KATHLEEN A. GRUBB, Deceased, *et al.*,
Appellants,

v.

THE STATE BANK OF BURDEN,
a Kansas Banking Corporation, *et al.*,
Appellees.

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date March 9, 1987

APPENDIX E

CONSTITUTION OF THE UNITED STATES

Article VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES

42 U.S.C. § 407 (1982). Assignment.

(a) Inalienability of right to future payments

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) Inamendability of section by inference

No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

(Aug. 14, 1935, c. 531, Title II, § 207, 49 Stat. 624; Aug. 10, 1939, c. 666, Title II, § 201, 53 Stat. 1362; Apr. 20, 1983, Pub.L. 98-21, Title III, § 335(a), 97 Stat. 130.)

Kan. Stat. Ann. 9-1206 (1982).

Set-off. Any bank shall have the right to set off any obligation or claim which it has, when the same is matured against any depositor.